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9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**

11 **KAPA INVESTMENT, a California**  
12 **corporation,**

13 **Plaintiff,**

14 **vs.**

15 **CIRRUS DESIGN CORPORATION; TELEDYNE**  
16 **CONTINENTAL MOTORS; GARMIN**  
17 **INTERNATIONAL; L-3 COMMUNICATIONS**  
18 **AVIONICS; STEC, INC.; AVIDYNE**  
19 **CORPORATION; and DOES 1 through 20,**  
20 **inclusive,**

21 **Defendants.**

22 **) CASE NO. CV 08-8446 PSG (JCx)**  
23 **)**  
24 **) NOTICE OF MOTION AND**  
25 **) PLAINTIFF'S MOTION IN LIMINE**  
26 **) NO. 1 TO PRECLUDE EVIDENCE**  
27 **) OR MENTION OF STATEMENTS**  
28 **) BY OR PRIOR TESTIMONY OF**  
**) KAMBIZ PAHLAVAN RE: USE**  
**) OF THE SUBJECT AIRCRAFT;**  
**) MEMORANDUM OF POINTS AND**  
**) AUTHORITIES; DECLARATION**  
**) OF ALAN R. GOLDEN**  
**)**  
**) HEARING DATE: 10/27/09, 9:00 A.M.**  
**) FINAL PRE-TRIAL CONF.: 10/19/09**  
**) JURY TRIAL: 10/27/09**  
**) TIME: 9:00 A.M.**  
**) COURTROOM 790 - ROYBAL**  
**)**

21 This motion is made following the conference of counsel pursuant to L.R. 7-3 which took  
22 place on September 4, 2009.

23 **PLEASE TAKE NOTICE** that on October 27, 2009 at 9:00 a.m., or on such other date or  
24 time as the court may hereafter set, in Courtroom 790 of the above court, plaintiff Kapa Investment  
25 will move for orders (1) excluding any evidence, mention or argument relating to a statement in an  
26 e-mail described below, and/or to deposition testimony, by Kambiz Pahlavan regarding the  
27 personal or business use of the 2005 Cirrus Design SR22-GTS single engine airplane that is the

1 subject of this action, and (2) redacting from each place such a reference appears in said e-mail,  
 2 from the deposition testimony of Mr. Pahlavan taken in this action, and from any other place  
 3 where such a reference may appear.

4 The subject evidence is irrelevant, immaterial, prejudicial under Rules 403, 404(a)(3), (b),  
 5 and 608 of the *Federal Rules of Evidence*.

## 6 7 I

### 8 BACKGROUND FOR THE MOTION

9 This is a suit for damages under the Magnuson-Moss Warranty Act (MMWA) by plaintiff  
 10 Kapa Investment (Kapa), a California corporation whose sole shareholder, director and president  
 11 is Kambiz Pahlavan. The allegedly defective product involved is a 2005 Cirrus Design SR22-  
 12 GTS single engine airplane (the Aircraft).

13 The defendants are Cirrus Design Corporation (Cirrus), the manufacturer of the Aircraft;  
 14 and Teledyne Continental Motors, Inc. (TCM), the manufacturer of its engine.<sup>1</sup>

15 It is undisputed that on January 14, 2008, Mr. Pahlavan sent an e-mail to Darrell Yelton of  
 16 Cirrus in which he complained about the length of time the Aircraft was out of service due to  
 17 warranty repairs. A copy of that two page e-mail is attached hereto as Exhibit "1" and is  
 18 incorporated by reference.

19 In the second sentence, last paragraph, first page of the e-mail, Mr. Pahlavan stated:

20 "I fly the plane for business regularly and I already have changed a bunch of my schedule  
 21 juggling things and pushing it back to after 1/20/07 thinking that I would have the plane by  
 end of this week as it was scheduled before."

22 Attached hereto as Exhibit "2" and incorporated by reference are copies of pages 112  
 23 through 119 of the deposition of Kambiz Pahlavan taken on May 18, 2009. Mr. Pahlavan was  
 24 questioned by counsel for former defendant Garmin International, Inc. whether all his e-mail

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25  
 26 <sup>1</sup>Defendant Garmin has obtained summary judgment and Kapa is in the process of  
 27 finalizing settlements with defendants L-3, S-TEC and Avidyne. The only things remaining to be  
 28 done are to agree upon the form of the settlement agreement / release with S-TEC and to apply to  
 the court for a dismissal of those defendants upon completion of the settlement. Plaintiff believes  
 this will be accomplished very soon and that those defendants will not be before the court when  
 this motion is heard. Therefore, those defendants will not be mentioned further in this motion.

1 statements were true. Mr. Pahlavan responded,

2 “and I’m not sure even if it is in these e-mails or not, but at one point I told Cirrus that in  
3 order for them to get them a sense of urgency, I told them I need the plane, and I flew the  
4 plane for business, I – you know, so on and so forth.”<sup>3</sup> He then answered “yes,” when  
5 asked if that statement was “inaccurate.”<sup>4</sup>

6 He also answered that “I guess you could put it that way” when asked whether “you lied to Cirrus  
7 in making this statement so that they would have this sense of urgency in repairing your plane?”<sup>5</sup>

## 8 II

### 9 THIS EVIDENCE IS INADMISSIBLE BECAUSE (a) IT IS NOT MATERIAL TO 10 THE ISSUES IN THIS MATTER AND (b) IT IS AN ATTEMPT TO IMPEACH 11 BASED UPON OTHER “WRONGS” OR “ACTS”

#### 12 a. How a Particular Buyer Uses the Product is Immaterial to Any Issue under the 13 MMWA, Including Whether a Claimant Has “Consumer” Status.

14 If the use to which a particular buyer put the goods were material, then the statements by  
15 Mr. Pahlavan also could be material. However, a consumer’s particular use of the product in  
16 question is immaterial under the MMWA.

17 “The Magnuson-Moss Act was adopted to make warranties on consumer products more  
18 readily understood and enforceable and to provide the Federal Trade Commission with  
19 means of better protecting consumers. (Citation omitted.) The Act defines ‘consumer  
20 products’ as ‘any personal property ... which is normally used for personal, family or  
21 household purposes ...’ 15 U.S.C. 2301(1). The implementing regulations explain that  
22 this definition encompasses *all products commonly used* for consumer purposes,  
*regardless of their actual use by the individual purchaser*. See C.F.R. § 700.1(a).  
Products commonly used for *both* personal and commercial purposes *are deemed*  
*consumer products, and any ambiguities in the definition are resolved in favor of*  
*coverage*” (emphasis added). *Kwiatkowski v. Volvo Trucks North America* 500 F. Supp.  
2d 875, 876 (N.D. Ill., 2007).

23 C.F.R. §700.1(a) contains additional language pertinent to Kapa’s contention:

24 “This means that a product is a ‘consumer product’ if the use of that type of product is *not*  
25 *uncommon*. The *percentage of sales or the use to which a product is put by any individual*

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26 <sup>3</sup>Pg. 113, lns. 19-24.

27 <sup>4</sup>Pg. 114, lns. 3-5.

28 <sup>5</sup>Pg. 114, lns. 21-24.

1 *buyer is not determinative.* For example, products such as automobiles and typewriters  
 2 which are used for both personal and commercial purposes come within the definition of  
 consumer product.” (emphasis added).

3 In *Business Modeling Techniques, Inc. v. General Motors Corporation*, 474 N.Y.S.2d 258,  
 4 260, 261 (1984), the court held consistently that an automobile purchased by a corporation  
 5 qualifies as a consumer product under the Act even though the plaintiff had “admitted at an  
 6 examination before trial that the automobile was used mainly for business purposes.”

7 Similarly, in *Stoebner Motors, Inc. v. Automobili Lamborghini S.P.A.*, 459 F.Supp.2d  
 8 1028, 1033 (USDC, D. Hawaii, 2006), a corporation that purchased a Lamborghini automobile  
 9 was a “consumer” under the MMWA because

10 “there is no statutory directive to examine the status of the owner to determine how a  
 11 product is normally used,” and “[t]hus the particular use to which a plaintiff puts the  
 product is not determinative; it is the type of product that matters.”

12 Accordingly, Kapa need not prove how the Aircraft actually was used. Rather - as was  
 13 briefed in detail during the two summary judgment proceedings in this matter - the only issue is  
 14 how a single engine airplane of this sort “normally” is used, that is, whether it is “not uncommon”  
 15 for the product category to be used for personal purposes. Therefore, whether or not Kapa or Mr.  
 16 Pahlavan regularly needed, or used, the Aircraft for business purposes is immaterial.

17 For those reasons, unless the court were to disagree and rule that Kapa’s use of the Aircraft  
 18 is material, *Kapa will not introduce evidence as to its use of the Aircraft.*<sup>6</sup>

19  
 20 **b. A Witness’s Character or Believability May Not be Impeached by Proof of**  
 21 **Prior “Acts.”**

22 Any protestations to the contrary notwithstanding, the defendants want to present Mr.  
 23 Pahlavan’s out of court e-mail statement, and his above-described deposition testimony, to the jury  
 24 to try to impeach his in court testimony *even if Kapa introduces no evidence as to the personal or*  
 25 *business use of the Aircraft.* Clearly, this would allow them to argue that his testimony in court  
 26 should not be “trusted.” The law does not permit such evidence.

27  
 28 <sup>6</sup>The evidence simply will be that the Aircraft always has been flown by Mr. Pahlavan and  
 may show the places to which he flew (the pilot’s log book shows this as well).

1 Rule 404 of the *Federal Rules of Evidence* states that in a civil case,<sup>7</sup>

2 “(a) Evidence of a person’s character or a trait of character is not admissible for the  
 3 purpose of proving action in conformity therewith on a particular occasion, except:  
 4 ..... [inapplicable] (3) Evidence of the character of a witness, as provided in rules 607  
 5 [criminal cases], 608, and 609 [criminal cases].

6 (b) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a  
 7 person in order to show action in conformity therewith. It may, however, be admissible for  
 8 other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge,  
 9 identity, or absence of mistake or accident, ..... [inapplicable].”

10 The prior acts exceptions listed in sub-part (b) of Rule 404 are inapplicable to the “use”  
 11 statement involved here. Nothing in that statement or its later contradiction tends to prove or  
 12 disprove any portion of Kapa’s actual case. Rather, it simply shows that Kambiz Pahlavan made  
 13 an out of court misstatement with regard to something that is *not* an issue in this case. It simply is  
 14 a prior “act” that cannot be used to impeach his character or to prove anything else material to the  
 15 issues in this matter.

16 Part (a) of Rule 608 states similarly that witness credibility may be attacked *only* by  
 17 “evidence in the form of opinion or reputation” as to the witness’s “character for truthfulness or  
 18 untruthfulness.” As mentioned above, the “use” statement does not provide “opinion” or  
 19 “reputation” information about Mr. Pahlavan’s character for truthfulness.

20 Part (b) of Rule 608 states that

21 “Specific instances of the conduct of a witness, for the purpose of attacking or supporting  
 22 the witness’ character for truthfulness, other than conviction of crime as provided in rule  
 23 609, may not be proved by extrinsic evidence.”

24 An exception to that blanket prohibition against evidence of specific instances of conduct,  
 25 called “impeachment by contradiction,” allows extrinsic evidence in certain limited situations, i.e.,

26 “impeachment by contradiction ‘permits courts to admit extrinsic evidence that specific  
 27 testimony is false, because contradicted by other evidence’ (emphasis added).  
 28 Impeachment by contradiction is an *exception* to the collateral fact rule embodied in  
 Federal Rule of Evidence 608(b), which *generally prohibits the introduction of extrinsic  
 evidence to attack the credibility of a witness*” (emphasis added). *United States v. Kincaid-  
 Chauncey*, 556 F.3d 923, 932 (9<sup>th</sup> Cir., 2009).

Consistently, in *United States v. Green*, 648 F.2d 587 (9<sup>th</sup> Cir., 1981), defendants’

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<sup>7</sup>Exceptions in sub-parts (1) and (2) of the Rule that are related to criminal matters only are omitted here.



convictions were reversed because the trial court had permitted the prosecutor to cross-examine about prior misconduct and contraband seized from the defendants' home. As in the instant case, the elicited testimony had nothing to do with the issues in the case and the subject had not been brought up by the defendants (648 F.2d 590). The Ninth Circuit applied Rule 608(b) (648 F.2d 596), noting in footnote 12 that the evidence should not have been admitted because "the statements were given in direct response to specific questions asked on cross-examination."

Here, any inquiry about Mr. Pahlavan's e-mail or later deposition testimony would come from the defendants. The "use" claim does not deal with any issue in this case and would be a disallowed attempt by the defendants to attack Mr. Pahlavan's credibility solely by way of extrinsic evidence.

Even the "impeachment by contradiction" *exception* to Rule 608's general prohibition against extrinsic evidence

"comes with its own important limitation. In general, a witness may be impeached by contradiction only if 'the statements in issue [have] been volunteered on direct examination'." *United States v. Kincaid-Chauncey*, supra, @556 F.3d 932.

That is because the purpose of the exception is "rooting out perjury," not "to trap an unwary witness into 'volunteering' statements on cross-examination" (556 F.3d 933).<sup>8</sup>

Last, this evidence should be excluded because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Federal Rules of Evidence*, Rule 403.

**DATED:** September 10, 2009.

Respectfully submitted,

**LAW OFFICES OF ALAN R. GOLDEN**

By   
**Alan R. Golden**  
 Attorney for plaintiff Kapa Investment

<sup>8</sup>That is precisely how this information first was placed into controversy in this case - upon cross-examination of Mr. Pahlavan at a deposition.

**DECLARATION OF ALAN R. GOLDEN IN SUPPORT OF IN LIMINE MOTION**

I, Alan R. Golden, declare:

1. I am an attorney at law licensed to practice before this honorable court and all courts of the state of California. I am counsel of record for plaintiff Kapa Investment in the within action. The facts stated herein are true of my own personal knowledge.

2. The undisputed evidence in this matter shows that on January 14, 2008, Kambiz Pahlavan, the sole shareholder, director and president of plaintiff Kapa Investment, sent an e-mail to Darrell Yelton of defendant Cirrus Design Corporation. In that e-mail he complained about the length of time the 2005 Cirrus Design airplane that is the subject of this action was out of service due to warranty repairs. A copy of that two page e-mail is attached hereto as Exhibit "1" and is incorporated by reference.

3. In the second sentence of the last paragraph on the first page of the e-mail, Mr. Pahlavan stated:

"I fly the plane for business regularly and I already have changed a bunch of my schedule juggling things and pushing it back to after 1/20/07 thinking that I would have the plane by end of this week as it was scheduled before."

4. Attached hereto as Exhibit "2" and incorporated by reference are copies of the cover page and pages 112 through 119 of the deposition of Kambiz Pahlavan taken on May 18, 2009. Mr. Pahlavan was questioned by counsel for former defendant Garmin International, Inc. about whether all his e-mail statements involving the Aircraft were "true and accurate." As pertinent, Mr. Pahlavan responded,

"and I'm not sure even if it is in these e-mails or not, but at one point I told Cirrus that in order for them to get them a sense of urgency, I told them I need the plane, and I flew the plane for business, I – you know, so on and so forth." He then answered "yes," when asked if that statement was "inaccurate."

He also answered that "I guess you could put it that way" when asked whether "you lied to Cirrus in making this statement so that they would have this sense of urgency in repairing your plane?"

1           5.       On September 4, 2009, pursuant to Local Rule 7-3, I met personally with Peter  
2 Cook and Will Skinner, counsel for defendants Cirrus Design Corporation and Teledyne  
3 Continental Motors, Inc., respectively. At that time, I told them in substance that I would be  
4 bringing this in limine motion on behalf of my client and that the requested relief would be for an  
5 order excluding any reference or testimony relating to the e-mail statement and deposition  
6 testimony of Kambiz Pahlavan described in paragraphs 2, 3 and 4 of this declaration, redacting the  
7 reference to "use" from that e-mail and from the deposition testimony where such reference or  
8 testimony appears, and redacting such a reference from any other place where such a reference  
9 may appear. I also told them that my client's position is that the subject matter is irrelevant,  
10 immaterial and unduly prejudicial.

11           6.       Both Mr. Cook and Mr. Skinner stated, in substance, that they would attempt  
12 to introduce such references and testimony at the trial, and that they would oppose a motion such  
13 as the subject motion.

14           7.       I did not attempt to discuss this motion with counsel for defendants L-3, S-TEC or  
15 Avidyne because plaintiff has reached a settlement with them all and they are likely to have been  
16 dismissed from this case by the time this motion is ruled upon. However, I have served their  
17 counsel with copies of these moving papers.

18           I declare under penalty of perjury that the foregoing is true and correct and that this  
19 declaration was executed on September 10, 2009 at Woodland Hills, California.

20 

21 **Alan R. Golden**  
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